

Shilashshree Shirley Gomez v Raymond Shilendran a/l Simon

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO B-02(IM)-780-05 OF 2023

KAMALUDIN MD SAID, AZIMAH OMAR AND WONG KIAN
KHEONG JJCA

5 AUGUST 2024

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Family Law — Maintenance — Attachment of earnings — High Court ordered husband to pay maintenance — Husband was adjudged bankrupt — Wife filed application to attach husband's earnings under s 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 ('the MWCA') — Husband filed preliminary objection that leave of Bankruptcy High Court was required under s 8(1) of the Insolvency Act 1967 ('the IA') — Whether husband could raise preliminary objection without any notice as required under Ruling 11.04 of the Rules and Rulings of the Bar Council — Whether leave of Bankruptcy High Court under s 8(1)(a) of the IA was required for attachment of bankrupt's earnings pursuant to s 4(1) of the MWCA — Whether costs should be awarded — Bankruptcy (Amendment) Act 2017 — Courts of Judicature Act 1964 s 70 — Federal Constitution — Insolvency Act 1967 ss 8(1)(a), 40(1), (2) & (3) — Legal Profession Act 1976 s 94(1), (2) & (3)(k) — Married Women and Children (Enforcement of Maintenance) Act 1968 ss 3 & 4(1) — Rules and Rulings of the Bar Council, Ruling 11.04 — Rules of the Court of Appeal 1994 rr 54 & 96

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The Family High Court had granted a decree of divorce to the petitioner and ordered the respondent to pay maintenance to both the petitioner and their children ('the maintenance order'). However, the respondent was subsequently adjudged bankrupt by the Bankruptcy High Court. The petitioner then filed an application in the Family High Court to attach the earnings of the respondent under s 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 ('the MWCA') ('the said application'). The respondent and the Director General of Insolvency ('the DGI') then filed a preliminary objection ('the PO') that the petitioner was required by s 8(1)(a) of the Insolvency Act 1967 ('the IA') to obtain leave of the Bankruptcy High Court before filing the said application. The Family High Court upheld the PO and struck out the said application without any order as to costs, hence, the present appeal. The novel issue that arose in this appeal was whether a person ('X') could apply to the Family High Court to attach the earnings of X's former spouse ('Y') under s 4(1) of the MWCA: (a) when X had obtained a maintenance order for Y to pay monthly maintenance for X and their children, and Y had been subsequently adjudged a bankrupt; and (b) without obtaining leave of the Bankruptcy High Court pursuant to s 8(1)(a) of the IA. In deciding

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A the present appeal, the court had considered the following questions:
 (a) whether the respondent could raise the PO without any notice as required
 under Ruling 11.04 of the Rules and Rulings of the Bar Council ('the BC's
 Rulings'); (b) whether leave of Bankruptcy High Court under s 8(1)(a) of the
 IA was required for attachment of bankrupt's earnings pursuant to s 4(1) of the
 B MWCA; and (c) should costs be awarded in the present case.

Held, allowing the appeal, setting aside the Family High Court's decision, and
 ordering that the said application be heard by the Family High Court on its
 merits with no order as to costs in the Family High Court and the Court of
 C Appeal:

- (1) DGI's legal officer was not subject to the BC's Rulings. However, the
 respondent's counsel, a practicing advocate and solicitor, was bound to
 comply with the BC's Rulings. Any advocate and solicitor who breached
 D any one of the BC's Rulings may be liable for disciplinary sanction by the
 Disciplinary Board under s 94(1), (2) and (3)(k) of the Legal Profession
 Act 1976. When an advocate and solicitor raised a PO without
 complying with Ruling 11.04 of the BC's Rulings, the said advocate and
 solicitor was estopped from raising the PO. It was important for all
 E advocates and solicitors to comply with Ruling 11.04. If otherwise, an
 advocate and solicitor may raise a 'PO by ambush' and caught his or her
 learned friend by surprise. Hearings by ambush were anathema to justice
 (see paras 15–17).
- (2) The court was of the view that s 4(1) of the MWCA applied to a
 F 'maintenance order' which was defined very widely in s 3(a) to (d) of the
 MWCA. Further, when a party (X) had obtained a 'maintenance order'
 against a 'defendant' from a 'court', and if the defendant was
 subsequently adjudged a bankrupt under the IA, X was not required by
 G s 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court before
 X could apply to the Family High Court against the defendant for an
 'attachment of earnings order' (see paras 19–20).
- (3) The above decision was premised on the following grounds: (a) the
 Parliament had expressly provided for the opening words
 H 'Notwithstanding any written law to the contrary' in s 4(1) of the
 MWCA and these express words clearly conferred primacy of this
 provision over all other written laws (with exception of the Federal
 Constitution and the Courts of Judicature Act 1964 ('the CJA'); and
 (b) s 8(1) of the IA had been amended by Parliament by way of the
 I Bankruptcy (Amendment) Act 2017 ('Act A1534'). There was a
 rebuttable presumption that our Legislature was deemed to know
 existing law. Consequently, when Act A1534 was passed, Parliament was
 deemed to know the primacy of s 4(1) of the MWCA. If the Legislature
 had intended to repeal the primacy of s 4(1) of the MWCA, the

Legislature would have expressly done so when Act A1534 was passed but the parliament did not do so. In other words, the Legislature had clearly intended for the primacy of s 4(1) of the MWCA to be still enforceable today (see para 20).

- (4) The learned High Court judge failed to consider the primacy of s 4(1) of the MWCA ('the first legal error'). There was nothing in s 40(1) to (3) of the IA, s 86(1) and (3) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') which nullified the primacy of s 4(1) of the MWCA. In relying on s 40(1) to (3) of the IA, s 86(1) and (3) of the LRA to support the Family High Court's decision, the learned High Court judge had committed another error of law ('the second legal error'). In view of the first and second legal errors, the court was constrained to allow the present appeal (see paras 21–23).
- (5) In view of the novelty of the issue in the present case, the court decided to exercise its discretion pursuant to s 70 of the CJA, and rr 54 and 96 of the Rules of the Court of Appeal 1994 that no costs shall be ordered for the proceedings in the Family High Court and Court of Appeal (see para 25).

[Bahasa Malaysia summary]

Mahkamah Tinggi Keluarga telah memberikan dekri perceraian kepada pempetisyen dan memerintahkan responden membayar nafkah kepada kedua-dua pempetisyen dan anak-anak mereka ('perintah nafkah'). Bagaimanapun, responden kemudiannya telah diputuskan bankrap oleh Mahkamah Tinggi Kebankrapan. Pempetisyen kemudian memfailkan permohonan di Mahkamah Tinggi Keluarga untuk penahanan pendapatan responden di bawah s 4(1) Akta Perempuan Bersuami dan Anak-Anak (Penguatkuasaan Nafkah) 1968 ('APBA') ('permohonan tersebut'). Responden dan Ketua Pengarah Insolvensi ('KPI') kemudian memfailkan bantahan awal ('BA') bahawa pempetisyen dikehendaki oleh s 8(1)(a) Akta Insolvensi 1967 ('AI') untuk mendapatkan kebenaran Mahkamah Tinggi Kebankrapan sebelum memfailkan permohonan tersebut. Mahkamah Tinggi Keluarga mengekalkan BA tersebut dan menolak permohonan tersebut tanpa apa-apa perintah mengenai kos, justeru, rayuan semasa. Isu baharu yang timbul dalam rayuan ini ialah sama ada seseorang ('X') boleh memohon kepada Mahkamah Tinggi Keluarga untuk penahanan pendapatan bekas pasangan X ('Y') di bawah s 4(1) APBA: (a) apabila X telah mendapat perintah nafkah untuk Y membayar nafkah bulanan untuk X dan anak-anak mereka, dan Y kemudiannya telah dihukum bankrap; dan (b) tanpa mendapat kebenaran Mahkamah Tinggi Kebankrapan menurut s 8(1)(a) AI. Dalam memutuskan rayuan semasa, mahkamah telah mempertimbangkan persoalan-persoalan berikut: (a) sama ada responden boleh membangkitkan BA tanpa apa-apa notis seperti yang dikehendaki di bawah Ketetapan 11.04 Peraturan dan Ketetapan Majlis Peguam ('Ketetapan MP'); (b) sama ada kebenaran Mahkamah Tinggi Kebankrapan di bawah s 8(1)(a) AI diperlukan untuk penahanan pendapatan

A orang yang bankrap menurut s 4(1) APBA; dan (c) adakah kos patut diberikan dalam kes ini.

Diputuskan, membenarkan rayuan, mengeneipikan keputusan Mahkamah Tinggi Keluarga, dan memerintahkan supaya permohonan tersebut didengar oleh Mahkamah Tinggi Keluarga atas meritnya tanpa perintah mengenai kos di Mahkamah Tinggi Keluarga dan Mahkamah Rayuan:

- (1) Pegawai undang-undang bagi KPI tidak tertakluk kepada Ketetapan MP tersebut. Bagaimanapun, peguam bela responden, seorang peguam bela dan peguam cara, terikat untuk mematuhi Ketetapan MP tersebut. Mana-mana peguam bela dan peguam cara yang melanggar mana-mana satu daripada Ketetapan MP tersebut boleh dikenakan tindakan tatatertib oleh Lembaga Tatatertib di bawah s 94(1), (2) dan (3)(k) Akta Profesion Undang-undang 1976. Apabila seorang peguam bela dan peguam cara membangkitkan BA tanpa mematuhi Ketetapan 11.04 Ketetapan MP tersebut, peguam bela dan peguam cara tersebut telah dihalang daripada membangkitkan BA. Adalah penting bagi semua peguam bela dan peguam cara untuk mematuhi Ketetapan 11.04 tersebut. Jika sebaliknya, peguam bela dan peguam cara boleh membangkitkan 'BA secara serang hendap' dan mengejutkan rakannya yang terpelajar. Perbicaraan dengan serang hendap adalah satu kutukan kepada keadilan (lihat perenggan 15–17).
- (2) Mahkamah berpendapat bahawa s 4(1) APBA terpakai kepada 'perintah nafkah' yang ditakrifkan secara meluas dalam s 3(a) hingga (d) APBA. Selanjutnya, apabila sesuatu pihak (X) telah memperoleh 'perintah nafkah' terhadap 'defendan' daripada 'mahkamah', dan jika defendan kemudiannya dihukum sebagai bankrap di bawah AI, X tidak diperlukan oleh s 8(1)(a) AI untuk mendapatkan kebenaran Mahkamah Tinggi Kebankrapan sebelum X boleh memohon kepada Mahkamah Tinggi Keluarga terhadap defendan untuk 'perintah penahanan pendapatan' (lihat perenggan 19–20).
- (3) Keputusan di atas adalah berdasarkan alasan-alasan berikut: (a) Parlimen telah dengan jelas memperuntukkan kata-kata pembukaan 'Walau apa pun mana-mana undang-undang bertulis yang berlawanan' dalam s 4(1) APBA dan kata-kata yang nyata ini jelas memberikan keutamaan peruntukan ini ke atas semua undang-undang bertulis lain (kecuali Perlembagaan Persekutuan dan Akta Mahkamah Kehakiman 1964 ('AMK'); dan (b) s 8(1) AI telah dipinda oleh Parlimen melalui Akta Kebankrapan (Pindaan) 2017 ('Akta A1534'). Terdapat anggapan yang boleh disangkal bahawa badan perundangan kita dianggap mengetahui undang-undang sedia ada. Akibatnya, apabila Akta A1534 diluluskan, Parlimen dianggap mengetahui keutamaan s 4(1) dalam APBA. Sekiranya badan perundangan berhasrat untuk memansuhkan

keutamaan s 4(1) APBA, badan perundangan akan melakukannya secara nyata apabila Akta A1534 diluluskan tetapi parlimen tidak melakukan sedemikian. Dalam erti kata lain, badan perundangan telah dengan jelas menginginkan agar keutamaan s 4(1) APBA masih boleh dikuatkuasakan pada hari ini (lihat perenggan 20).

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- (4) Hakim Mahkamah Tinggi yang bijaksana gagal mempertimbangkan keutamaan s 4(1) APBA ('kesilapan undang-undang pertama'). Tiada apa-apa dalam s 40(1) hingga (3) AI, s 86(1) dan (3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMUU') yang membatalkan keutamaan s 4(1) APBA. Dengan bergantung pada s 40(1) hingga (3) AI, s 86(1) dan (3) AMUU untuk menyokong keputusan Mahkamah Tinggi Keluarga, hakim Mahkamah Tinggi yang bijaksana telah melakukan satu lagi kesilapan undang-undang ('kesilapan undang-undang kedua'). Mengambil kira kesilapan undang-undang pertama dan kedua tersebut, mahkamah tiada pilihan lain selain membenarkan rayuan semasa (lihat perenggan 21–23).

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- (5) Mengambil kira kebaharuan isu dalam kes ini, mahkamah memutuskan untuk menggunakan budi bicaranya menurut s 70 AMK, dan kk 54 dan 96 Kaedah-Kaedah Mahkamah Rayuan 1994 bahawa tiada kos boleh diperintahkan untuk prosiding di Mahkamah Tinggi Keluarga dan Mahkamah Rayuan (lihat perenggan 25).]

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Cases referred to

Firdaus Khan bin Parit Khan & Anor v CIMB Bank Bhd [2024] 4 MLJ 474; [2024] 5 MLRA 108, CA (refd)

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Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd [2021] MLJU 1061; [2021] 8 AMR 174, HC (refd)

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Legislation referred to

Courts of Judicature Act 1964 s 70

Federal Constitution art 4(1)

Insolvency Act 1967 ss 2, 8, 8(1)(a), 40(1), (2), (3)

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Law Reform (Marriage and Divorce) Act 1976 s 86(1), (3)

Legal Profession Act 1976 s 94, (1), (2), (3)(k)

Married Women and Children (Enforcement of Maintenance) Act 1968 ss 3, 3(a), (b), (c), (d), 4, 4(1)

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Rules of the Court of Appeal 1994 rr 54, 96

Appeal from: *Shilashshree Shirely Gomez v Raymond Shilendran all Simon* [2019] MLJU 1578 (High Court, Shah Alam)

A *Derek Tan @ Tan Boon Chong (with Roopini a/p Ramasamy) (BC Tan & Co) for the appellant.*
Marian Nisha Supaya (with Elena Ruran Adolfo Libut) (Yuvenes Marian Partnership) for the respondent.

B **Wong Kian Kheong JCA:**

A. NOVEL ISSUE

C [1] This judgment discusses a novel question of whether a person ('X') can apply to the Family High Court to attach the earnings of X's former spouse ('Y') under s 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 ('the MWCA'):

(1) when:

D (a) X has obtained a maintenance order from the Family High Court for Y to pay monthly maintenance for X and the children from X's marriage with Y; and

E (b) Y has been subsequently adjudged a bankrupt under the Insolvency Act 1967 ('the IA'); and

(2) without obtaining leave of the Bankruptcy High Court pursuant to s 8(1)(a) of the IA.

F [2] At the time of the preparation of the draft of this judgment ('draft'), the learned Chairperson of this panel, Kamaludin bin Md Said JCA, has retired. I have forwarded the draft to my learned sister, Azimah bt Omar JCA who has expressed her concurrence with the draft.

B. BACKGROUND

G [3] The petitioner ('petitioner') was the former wife of the respondent ('respondent').

H [4] The petitioner and respondent have two children from their marriage ('two children').

[5] On 9 October 2019, upon an application by the petitioner, the Family High Court:

I (a) granted a decree of divorce to the petitioner; and
(b) ordered the respondent to pay the following sums, among others:
(i) monthly maintenance of RM1,500 to be paid to the petitioner until the petitioner remarries; and

- (ii) monthly maintenance in a sum of RM2,000 for the two children until the two children attain the age of 18 years old or after the completion of their tertiary education,
(‘maintenance order’). A
- [6] The respondent was adjudged a bankrupt by the Bankruptcy High Court on 9 February 2022 (‘bankruptcy order (respondent)’). B
- [7] On 28 June 2022, with regard to the respondent’s bankruptcy, the petitioner had filed with the Director General of Insolvency (‘DGI’) a proof of debt for a total sum RM136,448.19 (‘POD (petitioner)’). C
- [8] The POD (petitioner) concerned maintenance for the petitioner and two children which had not been paid by the respondent pursuant to the maintenance order. D
- C. PETITIONER’S APPLICATION TO ATTACH RESPONDENT’S EARNINGS
- [9] On 4 July 2022, premised on the maintenance order, the petitioner filed an application in the Family High Court to attach the earnings of the respondent under s 4(1) of the MWCA (‘petitioner’s application (attachment of respondent’s earnings)’). E
- [10] The respondent had obtained the DGI’s sanction to oppose the petitioner’s application (attachment of respondent’s earnings). F
- [11] On 11 April 2023:
- (a) when the petitioner’s application (attachment of respondent’s earnings) was first heard by the learned High Court judge (as she then was), both the learned counsel for the respondent and DGI raised a preliminary objection (‘PO’) that the petitioner was required by s 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court before the petitioner could lawfully file the petitioner’s application (attachment of respondent’s earnings); and G
- (b) after hearing oral submission by all the parties, the Family High Court upheld the PO and struck out the petitioner’s application (attachment of respondent’s earnings) without any order as to costs (‘Family High Court’s decision’). H
- [12] The petitioner has filed an appeal to the Court of Appeal against the Family High Court’s decision (‘this appeal’). I

A D. GROUNDS FOR FAMILY HIGH COURT’S DECISION

[13] The learned High Court judge’s ‘grounds of judgment’ (‘GOJ’) provided the following reasons, among others, for the Family High Court’s decision:

- B**
- (a) according to s 8 of the IA, upon the making of a bankruptcy order, no creditor of the bankrupt shall have any remedy against the bankrupt’s property in respect of the bankrupt’s ‘debt provable in bankruptcy’ — para 14 GOJ;
- C**
- (b) the debt due from the respondent to the petitioner under the maintenance order was a ‘debt provable in bankruptcy’ within the meaning of s 40(3) of the IA — paras 15–17 GOJ. In fact, the POD (petitioner) had been filed with the DGI with regard to the arrears of maintenance due from the respondent to the petitioner under the maintenance order — para 17 GOJ;
- D**
- (c) s 86(1) of the Law Reform (Marriage and Divorce) Act 1976 (‘the LRA’) has expressly provided that arrears of maintenance pursuant to a court order of maintenance is a debt provable in bankruptcy — paras 18–19 GOJ; and
- E**
- (d) based on the above reasons, the petitioner’s application (attachment of respondent’s earnings) was filed prematurely without leave of the Bankruptcy High Court — paras 20 and 23 GOJ.

F E. WHETHER RESPONDENT COULD RAISE PO WITHOUT ANY NOTICE

[14] Ruling 11.04 of the ‘Rules and Rulings of the Bar Council’ (‘BC’s rulings’) states as follows:

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- 11.04. *Notice of (PO)*
- (1) *An Advocate and Solicitor (A&S) shall give written notice to the (A&S) representing all the other parties in the litigation, of his/her intention to raise a (PO) at any hearing before any court, tribunal or other body.*
- H**
- (2) *Such written notice shall be given to the other (A&S) within a reasonable time before the hearing and in any event not later than 4 clear working days before the hearing, to enable the other (A&S) to properly prepare themselves and to secure instructions from their clients with regard to the proposed (PO).*
- (3) *Such written notice shall set out the following details:*
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- (a) *the nature of the proposed (PO);*
- (b) *a list of authorities that the (A&S) raising the (PO) intends to rely on; and*
- (c) *the proposed relief that the (A&S) raising the (PO) will seek before the court, tribunal or other body.*

(4) *Only in exceptional circumstances may an (A&S) raise a (PO) during the hearing of any matter without giving the written notice required in this Ruling. In such event the (A&S) representing the other parties are entitled to request for an adjournment of the (PO) and the (A&S) raising the (PO) is precluded from objecting to such a request.*

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(5) *Nothing in this Ruling shall affect the general discretion of the relevant court, tribunal or other body to deal with (POs), including making orders for costs.* (Emphasis added.)

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[15] Firstly, DGI's legal officer is not subject to the BC's rulings. However, the respondent's learned counsel, a practising A&S, is bound to comply with the BC's rulings. Any A&S who breaches any one of the BC's rulings may be liable for disciplinary sanction by the Disciplinary Board ('DB') under s 94(1), (2) and (3)(k) of the Legal Profession Act 1976 ('the LPA'). We reproduce below the relevant part of s 94 LPA:

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94 *Power of (DB) to strike off the Roll, suspend for misconduct, etc*

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(1) *All (A&S) shall be subject for the purposes of all disciplinary actions to the control of the (DB).*

(2) *Any (A&S) who has been guilty of any misconduct shall be liable to be struck off the Roll or suspended from practice for any period not exceeding five years.*

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(3) *For the purposes of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an (A&S) in a professional capacity or otherwise which amounts to grave impropriety and includes —*

...

(k) *the breach of (LPA) or of any rules made thereunder or any direction or ruling of the Bar Council; ...* (Emphasis added.)

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[16] When an A&S raises a PO without complying with Ruling 11.04 BC's rulings, the A&S is estopped from raising the PO. We refer to the following judgment of the High Court in *MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd* [2021] MLJU 1061; [2021] 8 AMR 174, at [18(1)]:

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[18] *Thirdly, when an A&S (X) does not comply with Ruling 11.04(2) in raising a PO on behalf of X's client (Y):*

(1) *Y is considered to have waived Y's right to raise the PO. I rely on the following judgment of Low Hop Bing J (as he then was) in the HC case of Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501; [2002] 2 CLJ 81 ('MBSB's case'), at p 513–515 (MLJ); 95–97 (CLJ):

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Preliminary Objections

It is to be noted that in the six or more affidavits filed by the defendant to resist the plaintiff's application herein, the defendant did not advert to any preliminary objection, nor give the plaintiff any notice of the defendant's intention to raise preliminary objections, which only surface now in the submissions presented for the defendant, thereby springing surprises on the plaintiff. In such a situation, part H,

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- A *para 19(a), (b) and (c) of the Bar Council Rulings 1997 requires that a written notice be given ...*
- ...
- B *Apart from the aforesaid ruling, our courts have consistently upheld such procedure ie, in giving the other side notice at the earliest moment: per Thomson CJ in Gurbachan Singh v Seagrott & Campbell (No. 2) [1962] 28 MLJ 370; per Edgar Joseph Jr J (later FCJ) in Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394; per Abdul Kadir Sulaiman J (now JCA) in Datuk Bandar Kuala Lumpur v Seman bin Amat & anor and other actions [1996] MLJU 540; [1996] 3 CLJ 263.*
- C *In Bukit Melita Sdn Bhd v Lam Geok Hee & Ors [1996] MLJU 227; [1997] 4 AMR 3160, one of the issues for determination revolves around the effect of the failure by the respondent's solicitor to give written notice of the preliminary objection to the appellant's solicitors. There I held as follows:*
- D *In my considered view, it is trite law that a party who wishes to raise any preliminary objection must give written notice to the other party's solicitors as early as possible of his intention to do so. Failure to do so would amount to a waiver of the party's right to raise the objection: per Mohd Hishamudin bin Mohd Yunus JC (as he then was) in Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors [1994] MLJU 149; [1995] 1 CLJ 237, and*
- E *Edgar Joseph in Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394. It was held in these two cases that the notice of preliminary objections must satisfy two requirements, viz: (a) the notice must be in writing; and (b) the notice should be given at the earliest possible moment to the other side who otherwise might be taken by surprise. It is obvious that the whole purpose*
- F *of the notice is to promote good etiquette amongst members of the Bar and more importantly to remove the element of surprise. It is necessary that the party against whom an objection is intended to be raised should not be taken by surprise and that both parties are given equal opportunities to prepare their submissions in order to ventilate all the relevant issues; being forewarned is*
- G *being forearmed. Although it is true to say that the element of surprise in the instant case is completely non-existent since the parties herein are given adequate equal opportunity and time to prepare their respective written submissions, it must be immediately emphasized that the notice of objection must at all times be given to the other side. There can be no excuse for any delay, intentional or otherwise, in giving notice to the appellant. Since the*
- H *respondents' learned counsel has failed to give any prior written notice of the preliminary objection, I hold that the respondents are deemed to have waived their rights to do so. Waiver implies something in the nature of estoppel (see Wong Chor San v Chop Yee Kuan [1975] 23 MLJ 68 at p 70).*
- I *On the aforesaid authorities, I would have thought that it would have been adequate to dismiss the preliminary objections raised by the defendant's learned counsel. (Emphasis added.)*

[17] We take this opportunity to reiterate the importance for all A&S to comply with Ruling 11.04 BC's rulings. If otherwise, an A&S may raise a 'PO by ambush' and catch his or her learned friend by surprise. Hearings by ambush are anathema to justice.

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F. WHETHER LEAVE OF BANKRUPTCY HIGH COURT UNDER S 8(1)(a) OF THE IA IS REQUIRED FOR ATTACHMENT OF BANKRUPT'S EARNINGS PURSUANT TO S 4(1) OF THE MWCA

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[18] We reproduce below ss 8(1)(a), 40(1) to (3) of the IA, definitions of 'earnings' and 'maintenance order' in s 3 of the MWCA, s 4 of the MWCA, s 86(1) and (3) of the LRA:

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IA

s 8 *Effect of bankruptcy order*

(1) *On the making of a bankruptcy order —*

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- (a) *except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose;*

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s 40 *Description of debts provable in bankruptcy*

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.
- (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the bankruptcy order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.
- (3) *Save as provided in subsections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the bankruptcy order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order shall be deemed to be debts provable in bankruptcy.*

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MWCA

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s 3 *Interpretation*

'earnings', in relation to a defendant, means any sums payable to him —

- (a) *by way of wages or salary, including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service;*
- (b) *by way of pension, including gratuity and an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or*

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A *relinquishment, or any diminution in the emoluments, of any office or employment;*

...

‘maintenance order’ means —

B (a) *an order made under section 3 of the Married Women and Children (Maintenance) Act 1950;*

(b) *an order for the payment of periodical sums by way of maintenance or alimony to a wife or for the benefit of any child under the Law Reform (Marriage and Divorce) Act 1976;*

C (c) *a maintenance order confirmed by the court under the Maintenance Orders (Facilities for Enforcement) Act 1949; and*

(d) *where this [MWCA] are made applicable by virtue of an authorization under section 14 to or in respect of a maintenance order made by a Syariah Court shall include such order.*

D

s 4 Power of court to make an attachment of earnings order.

(1) *Notwithstanding any written law to the contrary, the court may, upon application by the person for whose maintenance the order is made or the guardian of such person, make an attachment of earnings order, if the court considers it just so to make.*

E

(2) *An application for an attachment of earnings order may be made in the proceedings in which a maintenance order is applied for or in any subsequent proceedings.*

F

s 86 LRA Recovery of arrears of maintenance

(1) *Subject to subsection (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.*

G

...

(3) *No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit. (Emphasis added.)*

H

[19] Firstly, s 4(1) of the MWCA applies to a ‘maintenance order’ which is defined very widely in s 3(a) to (d) of the MWCA (including a maintenance order made by a Syariah Court).

I

[20] Secondly, we are of the following view:

(1) when a party (‘X’) has obtained a ‘maintenance order’ against a ‘defendant’ (defined in s 3 of the MWCA as a ‘person liable to make payments under the maintenance order’) from a ‘court’ (according to s 3 of the MWCA, ‘a court

competent to make a maintenance order' which we have referred to in this judgment as the Family High Court); and

(2) if the defendant is subsequently adjudged a bankrupt under IA,

— X is *not* required by s 8(1)(a) of the IA to obtain leave of the Bankruptcy High Court (s 2 of the IA defines 'the court' to mean 'the court having jurisdiction in bankruptcy' under IA) before X can apply to the Family High Court against the defendant for an 'attachment of earnings order' (defined in s 3 of the MWCA as an order made under s 4 of the MWCA). It is to be noted that s 3 of the MWCA has given a wide definition of 'earnings'.

The above decision is premised on the following reasons:

- (a) our Parliament has expressly provided for the opening words 'Notwithstanding any written law to the contrary' in s 4(1) of the MWCA. These express words, in our opinion, clearly confer primacy of s 4(1) of the MWCA over all other written laws (with the exception of the Federal Constitution ('the FC') and the Courts of Judicature Act 1964 ('the CJA')) ('Primacy of s 4(1) of the MWCA').

When the Legislature employs the term 'notwithstanding' in a particular legislation, this indicates the intention of the Legislature for that legislation to prevail over all other written laws (except for FC and CJA). The effect of the word 'notwithstanding' in a written law has been explained in the Court of Appeal case of *Firdaus Khan bin Parit Khan & Anor v CIMB Bank Bhd* [2024] 4 MLJ 474; [2024] 5 MLRA 108, at [20(1)], as follows:

[20(1)] *r 18(7) of the RCA is subject to r 18(7A) of the RCA due to the use of the word 'Notwithstanding' employed by the Rules Committee in r 18(7A) of the RCA. The effect of the term 'notwithstanding' has been explained by Low Hop Bing J (as he then was) in the High Court case of OCBC Bank (M) Bhd v Tan Eng Kwee and another application* [2003] 6 MLJ 470; [2003] 3 CLJ 161, at p 475 (MLJ); 165 (CLJ), as follows:

The phrase 'Notwithstanding sub-s (2)' in s 8(2A) [of the then named Bankruptcy Act 1967] means that s 8(2) is to be disregarded in so far as it is inconsistent with s 8(2A) so that the provisions of s 8(2A) shall prevail and play a predominant role to the exclusion of s 8(2) which has been rendered subservient to s 8(2A). (Emphasis added.)

Section 4(1) of the MWCA cannot override the FC because by virtue of art 4(1) of the FC, our FC is supreme. Article 4(1) of the FC reads as follows:

Article 4 *Supreme law of the Federation*

(1) *This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void. (Emphasis added.)*

- A According to s 4 of the CJA, in the event of inconsistency between CJA and any other written law other than the FC, the provisions of the CJA shall prevail. Hence, s 4(1) of the MWCA cannot override the CJA; and
- B (b) s 8 of the IA has been amended by Parliament by way of the Bankruptcy (Amendment) Act 2017 (Act A1534). There is a rebuttable presumption that our Legislature is deemed to know existing law — please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, at 754. Consequently, when Act A1534 was passed, Parliament was deemed to know the primacy of s 4(1) of the MWCA. If the Legislature had intended repeal the primacy of s 4(1) of the MWCA, the Legislature would have expressly done so when Act A1534 was passed. Our Parliament did not however do so. In
- C other words, the Legislature has clearly intended for the primacy of s 4(1) of the MWCA to be still enforceable today.
- D

[21] As explained in the above para 20, the learned High Court judge had failed to consider the primacy of s 4(1) of the MWCA ('first legal error').

[22] There is nothing in s 40(1) to (3) of the IA, s 86(1) and (3) of the LRA which nullifies the primacy of s 4(1) of the MWCA. In relying on s 40(1) to (3) of the IA, s 86(1) and (3) of the LRA to support the Family High Court's decision, the learned High Court judge had committed another error of law ('second legal error').

[23] In view of the first and second legal errors, we are constrained to allow this appeal.

G. SHOULD COSTS BE AWARDED IN THIS CASE?

[24] The Court of Appeal has an unfettered discretion under s 70 of the CJA, rr 54 and 96 of the Rules of the Court of Appeal 1994 ('the RCA') to award costs of an appeal as well as costs of the proceedings in the High Court. Reproduced below are s 70 of the CJA, rr 54 and 96 RCA:

- s 70 CJA *Costs of appeal*
The Court of Appeal may make such order as to the whole or any part of the costs of appeal or in the court below as is just.
- I RCA
r 54 *Costs to be in the discretion of the Court*
Subject to the provisions of any other written law and these Rules, the costs of and incidental to all proceedings in the Court shall be in the discretion of the Court.

r 96 *Costs to be in the discretion of the Court or Judge*

A

Subject to the provisions of any other written law and these Rules, the costs of and incidental to all proceedings in the Court shall be in the discretion of the Court or Judge.

Provided that nothing herein contained shall deprive an executor, administrator, trustee, or chargee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the Rules hitherto acted upon. (Emphasis added.)

B

[25] In view of the novelty of the issue in this case, we have decided to exercise our discretion pursuant to s 70 of the CJA, rr 54 and 96 of the RCA that no costs shall be ordered for the proceedings in the Family High Court and Court of Appeal.

C

H. CONCLUSION

[26] Premised on the reasons explained in the above paras 20 to 23, we allow this appeal and make the following order:

D

- (a) the Family High Court's decision is set aside;
- (b) the petitioner's application (attachment of respondent's earnings) shall be heard by the Family High Court on its merits; and
- (c) there shall be no order as to costs in the Family High Court and Court of Appeal.

E

Order accordingly.

F

Reported by Dzulqarnain Ab Fatar

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